THIRD WORLD DEVELOPMENT LTD. & ANOR.

v.

ATANG LATIEF & ANOR.

COURT OF APPEAL, SINGAPORE
TS SINNATHURAY J
LAI KEW CHAI J
LP THEAN J
[CIVIL APPEAL NO. 24 OF 1985]
19 FEBRUARY 1990

CONTRACT: *Breach of undertaking - Economic duress - Guarantee or warranty discharge.*

The appellant at all material times was the chairman and managing director of Third World Development Ltd. a company incorporated in Sri Lanka and he also held 99% of the issued shares of the company.

The respondent entered into a written agreement with the company ("the main agreement") whereby *inter alia* the company appointed the respondents the sole and exclusive operators to operate or conduct a public casino or public gambling on two floors of the building for a period of ten years.

The respondents agreed to pay the company rent and a percentage of the net profit. The respondents further agreed to pay to the company on the signing of the main agreement "an amount equivalent to 12 months in advance based on an area of 40,000 sq. ft". Also the company should deliver possession of the two floors to the respondent not later than 6 months from on or before 1 June 1984. On execution of the agreement thereabout the respondents paid to the company sums of US$288,000 i.e., one half of the advance rent for the two floors payable by the respondents under the main agreement.

Subsequently a supplemental agreement was made between the company and the respondents varying certain provisions of the main agreement.

After the execution of the supplemental agreement the appellant executed a letter of undertaking addressed to both the respondents ("the undertaking") in consideration of the respondents, at the request of the appellant, to defer their decision to request Third World Development Ltd. to refund to you the advance rental of US$288,000 and to pay Third World Development Ltd. the further sum of US$288,000 being the remaining advance rental for the two floors of the building. The undertaking *inter alia* provides a guarantee that the respondents be permitted to operate and conduct a public club or public gambling at the said building and the following work and all other external work and services to that portion of the said building would be installed or completed before 30 June 1984, or one week before the building is to be opened by the Head of the Government of Sri Lanka or Malaysia.

In default of the above, the appellant undertakes and guarantee to, on demand, refund or pay to you without interest, the rental of US$288,000 and further rental of US$288,000. Upon execution of this undertaking the respondents paid a further sum of US$288,000 to the company.

The company defaulted on the undertaking and in fact the appellant were informed that it was not possible "to permit casino cum club" in the building.

The respondents demanded from the appellant payment of US$576,000 and upon default the respondents took out a writ against him joining the company as the 1st defendant. Judgment was entered against the appellant in default of appearance and this was set aside by the appellant. The company had never been served and the respondents amended the statement of claim and discontinued the action.

Held:

[1] Assuming that there was some pressure - Commercial pressure - Exerted on the appellant at the time of his execution of the undertaking, such pressure does not constitute economic duress unless it amounts to a coercion of his will which vitiates consent.

[2] There was nothing before the Court which could support the respondents's allegation that there was any coercion of his will in signing the undertaking.

[3] The appellant's allegations that he was not conversant in English are a complete fabrication.

[4] The mere raising of an issue that Sri Lankan law is applicable does not constitute a defence to the claim.

[5] The word "guarantee" in the undertaking is really in the nature of a warranty and not of a guarantee in the strict sense.

[6] There was no defence to the claim.

[Appeal dismissed with costs.]

Case referred to:

Pao On v. Lau Yiu Long [1980] AC 614

For the appellant - Steven Chong Horng Siong
For the respondents - Cheong Yuen Hee (Susan Jacob with him)

JUDGMENT

TS Sinnathuray J, Lai Kew Chai J, LP Thean J:

This was an appeal against the decision of Chua J in which he dismissed an appeal from the decision of the senior assistant registrar giving judgment to the plaintiffs, the respondents in this appeal ("the respondents"), in the sum of $1,226,880 (being the equivalent of US$576,000 at the exchange rate of $2.13) with interest and costs against Gwei Way Kiat, the appellant in this appeal ("the appellant").

The facts, in so far as relevant, giving rise to the appeal are briefly these. The appellant at all material times was the chairman and managing director of Third World Development Ltd., a company incorporated in Sri Lanka ("the company"), and also held about 99% of the issued shares of the company. In 1983, the company was engaged in the construction of a building called the Last Tallest Building ("the building"), at Station Road, Bambalapitiya, Colombo, Sri Lanka, and was also the owner of the building. On 2 December 1983 the respondents entered into a written agreement with the company ("the main agreement") whereby, amongst other things, the company appointed the respondents the sole and exclusive operators to operate or conduct a public casino or public gambling on two floors of the building for a period of ten years, and the respondents agreed (by clause 4.1) to pay to the company rent at a certain fixed rate for the two floors and also to pay to the company a percentage of the net profit. In respect of the rent the respondents further agreed (also by clause 4.1) to pay

to the company on the signing of the main agreement "an amount equivalent to 12 months in advance based on an area of 40,000 sq. ft.", which amounted to US$576,000. The main agreement also provided that the company should deliver possession of the two floors to the respondents not later than six months from the date thereof, i.e., on or before 1 June 1984. On the execution of the agreement or thereabout, the respondents paid to the company a sum of US$288,000 being one half of the advance rent for the two floors payable by the respondents under clause 4.1 of the main agreement. Subsequently, on 20 January 1984, a supplemental agreement ("supplemental agreement") was made between the company and the respondents varying certain provisions of the main agreement. We shall refer to both these agreement as "the agreements".

Soon after the execution of the supplemental agreement, the appellant on 16 February 1984 executed a letter of undertaking which was addressed to both the respondents ("the undertaking"). The text of the undertaking is as follows:

> In consideration of you agreeing, at my request, to defer your decision to request Third World Development Ltd. to refund to you the advance rental of US$288,000 and to pay to Third World Development Ltd. the further sum of US$288,000 being the remaining advance rental for that portion of the Tallest Building at Station Road, Bambalapitiya, Colombo 4, to be rented to you to enable you to operate or conduct a public club or public gambling under the agreement and the supplemental agreement dated 2 December 1983 and 20 January 1984 respectively, I hereby undertake and guarantee with you as follows:
>
> 1. undertake and guarantee that you are permitted to operate or conduct a public club or public gambling at the said building;
>
> 2. undertake and guarantee that the following work and all other external work and services to that portion of the said building to be rented to you would be installed or completed on or before 30 June 1984 or one week before the said building is officially opened by the Head of the Government of Sri Lanka or Malaysia whichever date is the earlier:
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> (a) permanent sufficient power supply with switch room and generator room;
>
> (b) permanent water supply connections;
>
> (c) permanent telephone lines (8 direct lines 2 IDD lines) and One Telex Line;
>
> (d) permanent sewer connections;
>
> (e) site work including roading, separate entrance for the club, external lightings, rain water drainage, fencing, car parking and clear separation of club and construction areas;
>
> (f) external finishes and waterproofing to the existing podium block.
>
> If, for any reason, you are not permitted to operate or conduct the public club or public gambling at the said building or if any of the work enumerated above is not installed or completed by the date indicated above, I undertake and guarantee to, on demand, refund or pay to you, without interest, the rental of US$288,000 and the further rental of US$288,000 which you have previously paid and which you will be paying to Third World Development Ltd.
>
> I further agree that you may enforce this undertaking and guarantee on me in Singapore, Malaysia or any other country of your choice and I hereby agree to submit to the jurisdiction of the Courts of the country so elected by you.
>
> Please note that this undertaking and guarantee will be null and void and ceased to have any effect as soon as you commence to operate or conduct the public club or public gambling at the said building.

After the execution of this undertaking, the respondents paid to the company a further sum of US$288,000 being the remaining half of the advance rent for 12 months stipulated in clause 4.1 of the main agreement.

Thereafter the following occurred. The company failed to deliver possession of the two floors of the building to the respondents on or before 1 June 1984; the various items of work expressed in the undertaking were not installed or completed by 30 June 1984. What is even more crucial is that the company was never issued with a licence to operate a public casino in the building. In fact, in a letter dated 23 February 1984 to the appellant, the secretary to the Ministry of Local Government, Housing & Construction of Sri Lanka, informed the appellant that it would not be possible "to permit Casino cum club" in the building.

On 3 July 1984, the respondents through their solicitors demanded from the appellant payment of the sum of US$576,000, and upon default by the appellant, the respondents took out a writ against him joining the company as the first defendant. Judgment was entered against the appellant in default of appearance; but he applied to set aside the default judgment, and it was set aside on payment of costs. As for the company, it had never been served, and the respondents subsequently amended the statement of claim and at the same time discontinued the action against the company. The company therefore is not a party to this appeal, though it is described in the heading as the first appellant.

The respondents' claim is a very simple one and is based wholly on the undertaking and the breaches of the undertaking on the part of the appellant. It is common ground that the undertaking was executed by the appellant, and that he has not honoured or performed the terms thereof. In particular, it is not disputed that the respondents were not permitted to operate or conduct "a public club or public gambling" at the building; nor is it disputed that the works enumerated in the said undertaking had not been installed or completed by the date indicated in the undertaking. Accordingly, it follows that in accordance with the terms of the undertaking, the appellant became liable to pay to the respondents on demand the total sum of US$576,000. The appellant, however, resisted the claim. The respondents took out an application for summary judgment and the senior assistant registrar gave summary judgment to them. The appellant appealed. Chua J. who heard the appeal dismissed it with costs. The appellant further appealed, and at the conclusion of the appeal we also dismissed it with costs.

Before us, Counsel for the appellant raised several defences and submitted that they were issues for trial; they may be summarised as follows:

(i) The appellant was induced or forced by economic duress into signing the undertaking;

(ii) The proper law of contract to be applied in this case is the law of Sri Lanka and evidence of Sri Lanka law would have to be adduced to determine the validity and enforceability of the undertaking;

(iii) Assuming that the undertaking was validly executed, on the true construction of the undertaking, it is a guarantee and not an indemnity, and the respondents would have to show that the company was in breach of the agreements under Sri Lanka law before they are entitled to call upon the appellant to pay the amount under the undertaking;

(iv) The undertaking was varied by a subsequent agreement contained in or evidenced by the letter of 9 March 1984 which agreement discloses an arrangement between the respondents, the appellant and the company, whereby the respondents were to acquire a majority shares in the company, and by reason of this variation the appellant was discharged from the undertaking.

We now consider each of these defences seriatim. Before the senior assistant registrar, Counsel for the appellant founded the defence of economic duress on the allegations that under clause 4.1 of the main agreement, the whole of the advance rent for 12 months for the 2 floors amounting to US$576,000 was due on the signing of the agreement, but the respondents paid only 50% thereof; that the respondents were contractually obliged to pay the balance of US$288,000; that the 1st respondent, Atang Latief, was a director of the company - he was appointed a director on 16 January 1984 - and he knew that the company was in dire financial straits and needed the money to pay sub-contractors, and that the appellant was the managing director of the company and was forced to sign the undertaking. To these was added a further allegation that the appellant was not conversant in English and the terms of the undertaking were not interpreted and explained to him. This defence was rejected by the senior assistant registrar. Before Chua J., Counsel for the appellant did not raise this defence, though he did not expressly abandon it. Before us, Counsel for the appellant - not the same Counsel who argued before the Senior Assistant Registrar and the learned Judge - resurrected this defence and argued as follows. The respondents were under a contractual obligation to pay the advance rent amounting to US$576,000 under clause 4.1 of the main agreement; as they had paid only one half of this amount, they were on 16 February 1984 wrongfully withholding the balance sum of US$288,000 from the company. The respondents were aware at all material times that the appellant and the company were in grave financial difficulties, that the construction costs of the building were due and payable and that unless the sub-contractors were paid, the project would be seriously jeopardized. Seised of this information and also knowing that alternative finance would not be readily available, the respondents deliberately and wrongfully refused to pay the balance sum of US288,000, and thus coerced the appellant into signing the undertaking.

An examination of the basic facts (disclosed in the various affidavits filed) which are not in dispute, shows clearly that the appellant has no factual basis for sustaining this defence of economic duress. It is common ground that under clause 4.1 of the main agreement the respondents agreed to pay to the company an amount of US$568,000 being the 12 month rent in advance for the two floors on the signing thereof, and that only a sum of US$288,000 was paid on or soon after the main agreement was signed. No complaint, however, appeared to have been made by the appellant or anyone on behalf of the company against this part payment. Nor was there any demand made by the appellant or anyone at the time for the balance. The 2nd respondent in his affidavit affirmed on 11 September 1984 explained that after the main agreement was executed only 6 month rent in advance was paid, as the appellant and the respondents agreed that the second half of the advance rent would be paid after the respondents had seen, and were satisfied with, the progress of the work on the building. This was not disputed by the appellant and is wholly consistent with the conduct of the parties. About 1 1/2 months later, 20 January 1984, the parties executed a supplemental agreement, which extended the rights of the respondents with respect to termination of the main agreement, and no reference was made in the supplemental agreement to any default by the respondents of payment of the second half of the advance rent under the main agreement. Plainly the parties must have agreed to a deferment of payment of this portion of the rent. According to the 2nd respondent little or no work had been done to the two floors, possession of which was to be delivered to the respondents on 1 June 1984, and the appellant did not have a casino licence. Again, this was not disputed by the appellant. In view of these, the respondents wished to terminate the main agreement but were requested by the appellant not to do so and to make payment of the balance sum of advance rent. The respondents were only prepared to make the payment on certain undertakings of the appellant; in consequence the undertaking was prepared by the respondent's solicitors and executed

by the appellant on 16 February 1984. The appellant, however, disputed that the respondents wanted to terminate the agreements and asserted that on or about 11 February 1984 the 1st respondent remitted a sum of money to Sri Lanka with a view to paying the second half of the advance rent. In this connection, he relied on a memorandum from a branch of The Chartered Bank in Singapore to the 1st respondent stating that two sums of money would be credited to his account in Colombo. This remittance of funds by the 1st respondent is quite equivocal and does not really support the appellant's, allegation. The total amount remitted was US$1,000,000, which might well be for the 1st respondent's other investment in Sri Lanka.

Moreover, immediately or soon after the undertaking was executed and the remaining half of the advance rent was paid to the company, the appellant did not make any complaint of the undertaking; he did not initiate any step to challenge or seek to avoid the undertaking; nor did he notify the respondents that as he was coerced into signing the undertaking he was seeking legal advice on the effect or validity of the undertaking.

On 24 February 1984 the company lost control of the building site; the National Development Housing Authority of Sri Lanka, which is the authority vested with the legal title to the building, took over possession and control of the building. This was disputed by the appellant who alleged that the company "was forced out" of the building and lost control and possession thereof to an "unidentified group or mob" or, as he later alleged, "to an unlawful gang of thugs" during the period of civil unrest in Colombo. This plainly was not so. First, according to one Benedict Trevor Eliatamby, a lawyer practising in Sri Lanka, there was definitely no civil unrest in Colombo in February or March 1984. Secondly, the takeover of the building was carried out and authorised by the National Development Housing Authority who appeared to have authorised a contractor, Nawaloka, to enter the site and take over the construction of the building. This was admitted by the appellant in his letter of 26 February 1984 written to the Chairman of the Urban Development Authority and Secretary to Local Government, Housing & Construction of Sri Lanka and in his letter of 28 February 1984 written to the High Commissioner of Malaysia for Sri Lanka. This is also evident from the minute or record of the discussion the appellant had with representatives of the Urban Development Authority on 26 February 1984.

The events that followed are also significant on the question whether the appellant was really coerced into signing the undertaking. Tan Kim Seng, the solicitor for the respondents, in his affidavit affirmed on 11 September 1984, said, amongst other things, that as nothing had been done by the company to obtain the casino licence and as the company had lost control of the building, the appellant was making arrangement - the precise date was not given - to refund the amount of US$576,000 to the respondents or to procure some 1000 acres of rambutan land in Johor, Malaysia to secure the payment of the sum, and that one Ho Thian Cheh, a solicitor practising in Johor, would be instructed on the matter. In response to this statement, the appellant said that the land belonged to Vita Tenggara Fruit Industries Sdn. Bhd. (in which presumably he had a substantial interest); that the 1st respondent had expressed an intention to buy the land, and that when the 1st respondent expressed his fear that the appellant would not have the means to pay him in the event that the appellant was liable under the undertaking, the appellant offered upon completion of sale of the land to have his part of the proceeds sale placed on a deposit to satisfy the respondents that he was able to honour his commitment if it arose. Such conduct on the part of the appellant is hardly consistent with his allegation that he had been coerced into signing the undertaking or his intention to disavow the undertaking on the ground of economic duress.

Nothing, however, developed out of the proposal of the appellant in relation to the land in Johore. Then on 3 July 1984 the respondents' solicitors despatched a telex to the appellant demanding payment of the sum of US$576,000 pursuant to the terms of the undertaking. In response, the appellant telexed to the respondents' solicitors on 12 July 1984 the following:

> We just read yr tlx dated 3 July 1984.
>
> Will go back to Malaysia to contact our legal adviser Mr. Ho Thian Cheh in J.B. to solve our mutual problem, so any further correspondence please refer to Mr. Ho Thian Cheh.

It is significant that even at this stage confronted with a demand for payment of the amount under the undertaking not a word was uttered by the appellant that the undertaking was forced on him or that the respondents in any way pressurised him to execute the undertaking. It was only after this action was started that the appellant complained that he was coerced into signing the undertaking, i.e., in his first affidavit affirmed on 30 August 1984 filed in support of his application to set aside the default judgment.

It was urged on us that at the time the appellant executed the undertaking, he had no alternative source of finance and therefore was pressurized into executing the document. The material disclosed before us shows the contrary. According to the minute or record of the discussion the appellant had with the representative of the Urban Development Authority on 26 February 1984, he emphatically refuted allegations that he did not have sufficient funds to complete the building and asserted that he "had been financially sound and he had also deposited One Million US Dollars with the Chartered Bank, Colombo for which they might investigate into same, if so desire".

Assuming that there was some pressure - commercial pressure - exerted on the appellant at the time of his execution of the undertaking, such pressure does not constitute economic duress unless it amounts to a coercion of his will which vitiates consent. Lord Scarmen in *Pao On v. Lau Yiu Long* [1980] AC 614 at pp. 635 to 636 said:

> Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J, in *Occidental Worldwide Investment Corporation v. Skibs A/S Avanti* [1976] 1 Lloyd's Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will as to vitiate his consent. This conception is in line with what was said in this Board's decision in *Barton v. Armstrong* [1976] AC 104, 121 by Lord Wilberforce and Lord Simmon of Glaisdale - observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are,as was recognised in *Maskell v. Horner* [1915] 3 KB 106, relevant in determining whether he acted voluntarily or not. ... The commercial pressure alleged to constitute such duress must, however, be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure: Williston on Contracts, 3rd ed., vol. 13 (1970), s. 1603.

There is nothing before us which could really support the respondents' allegation that there was any coercion of his will in signing the undertaking.

As for the appellant's allegations that he was not conversant in English and that the terms of the undertaking were not interpreted and explained to him, which presumably were meant to bolster his defence that he did not execute the undertaking voluntarily, we are in entire

agreement with Chua J. that these allegations are a complete fabrication. Mr Tan Kim Seng, the respondents' solicitor, who prepared the undertaking said that while he was in Colombo he communicated with the appellant exclusively in English. There was no denial of this fact by the appellant. The appellant himself wrote letters in English to the authorities in Colombo and also to the High Commissioner of Malaysia in Colombo. He attended and had a discussion, which was conducted in English, with the representative of Urban Development Authority in Colombo and thereafter wrote a minute or record of such discussion in English which he subsequently sent to the chairman of the authority. He never disclaimed that these were written by him; nor did he allege that they were written by someone else on his behalf.

We now turn to the second issue. This was not raised below. However, we cannot not see how this can be an issue for trial. It has not been suggested by Counsel for the appellant, nor was it in evidence, that under the law of Sri Lanka the undertaking is invalid or unenforceable in any way. The mere raising of an issue that the Sri Lanka law is applicable does not constitute a defence to the claim.

As for the third issue, it has again no merit. It is clear to us that under the terms of the undertaking the appellant was obliged to refund or pay the entire sum of US$576,000 to the respondents upon the happening of certain events therein specified, and one or more of the events had occurred, and there is no question that on the true construction of the terms of the undertaking the appellant is obliged to refund or pay to the respondents the entire amount. The word "guarantee" in the undertaking is really in the nature of a warranty and not of a guarantee in the strict sense.

As to the last defence raised, it is necessary to examine the content of the letter of 9 March 1984. It was a letter written by the company, Lauw & Sons Holdings Pte. Ltd., and signed by the 1st respondent as the chairman and another person, Ong Keng Kok, as a director, and was addressed to the company, and the content is as follows:

> I am instructed by Mr. Atang Latief, chairman of Lauw & Sons' Group to inform you that after his visit to Hawaii, he will be meeting the President of Sri Lanka. Mr Latief also intends to open a bank in the Republic of Maldives immediately.
>
> After meeting the President, he will make arrangement to remit another amount of US$9,000,000 (United States Dollars: Nine Million Only) for investments in tower, hotel and other projects in Sri Lanka.
>
> Please note that Mr Latief has already remitted an amount of US$1,000,000 (United States Dollar: One Million Only) on the 10 February 1984 in Sri Lanka.
>
> I thank you.

It is clear from the content of the letter that Lauw & Sons Holdings Pte. Ltd. were informing the company of their intention to remit sums of money for investment in "tower, hotel and other projects in Sri Lanka"; that letter has no bearing on the undertaking given by the appellant. We are therefore in complete agreement with Chua J. in his conclusion that the letter did not in any way vary or affect the undertaking; it referred to other investments.

In the result, we held that there was no defence to the claim and we dismissed the appeal with costs.

Also found at [1990] 1 CLJ 1055

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